

1 **WATER RIGHTS - CHANGE APPLICATION AMENDMENTS**

2 2013 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Kay L. McIff**

5 Senate Sponsor: _____

6

7 **LONG TITLE**

8 **General Description:**

9 This bill modifies the requirements of the change application process under Title 73,
10 Water and Irrigation.

11 **Highlighted Provisions:**

12 This bill:

- 13 ▶ defines terms;
- 14 ▶ exempts certain water rights from forfeiture provisions under Title 73, Water and
- 15 Irrigation;

16 ▶ requires that a person who applies for a change to a water right meet certain
17 qualifications and requirements;

18 ▶ requires that a record title owner of a water right who is not also the beneficial user
19 and equitable owner of the water right obtain consent from the beneficial user to file
20 a change application if the proposed change diminishes a fundamental part of the
21 water right, unless certain conditions are met;

22 ▶ requires a municipality that made certain permanent or temporary changes to a
23 water right to file a change application by a certain date;

24 ▶ modifies the procedure for, and requirements relating to, submitting a change
25 application for a shareholder in a water company;

26 ▶ modifies the procedure for, and requirements relating to, submitting a change
27 application for a person who is the beneficial user and equitable owner of a water



28 right but is not the record title owner; and

29 ▶ makes technical changes.

30 **Money Appropriated in this Bill:**

31 None

32 **Other Special Clauses:**

33 None

34 **Utah Code Sections Affected:**

35 AMENDS:

36 **73-1-4**, as last amended by Laws of Utah 2009, Chapter 388

37 **73-2-27**, as enacted by Laws of Utah 2005, Chapter 215

38 **73-3-3**, as last amended by Laws of Utah 2012, Chapter 229

39 **73-3-3.5**, as last amended by Laws of Utah 2008, Chapter 3

40 **73-3-30**, as last amended by Laws of Utah 2009, Chapter 344

41 ENACTS:

42 **73-3-3.6**, Utah Code Annotated 1953



44 *Be it enacted by the Legislature of the state of Utah:*

45 Section 1. Section **73-1-4** is amended to read:

46 **73-1-4. Reversion to the public by abandonment or forfeiture for nonuse within**
47 **seven years -- Nonuse application.**

48 (1) As used in this section:

49 (a) "Public entity" means:

50 (i) the United States;

51 (ii) an agency of the United States;

52 (iii) the state;

53 (iv) a state agency;

54 (v) a political subdivision of the state; or

55 (vi) an agency of a political subdivision of the state.

56 (b) "Public water supplier" means an entity that:

57 (i) supplies water, directly or indirectly, to the public for municipal, domestic, or

58 industrial use; and

- 59 (ii) is:
- 60 (A) a public entity;
- 61 (B) a water corporation, as defined in Section 54-2-1, that is regulated by the Public
- 62 Service Commission;
- 63 (C) a community water system:
- 64 (I) that:
- 65 (Aa) supplies water to at least 100 service connections used by year-round residents; or
- 66 (Bb) regularly serves at least 200 year-round residents; and
- 67 (II) whose voting members:
- 68 (Aa) own a share in the community water system;
- 69 (Bb) receive water from the community water system in proportion to the member's
- 70 share in the community water system; and
- 71 (Cc) pay the rate set by the community water system based on the water the member
- 72 receives; or
- 73 (D) a water users association:
- 74 (I) in which one or more public entities own at least 70% of the outstanding shares; and
- 75 (II) that is a local sponsor of a water project constructed by the United States Bureau of
- 76 Reclamation.
- 77 (c) "Shareholder" is as defined in Section 73-3-3.5.
- 78 (d) "Water company" is as defined in Section 73-3-3.5.
- 79 (e) "Water supply entity" means an entity that supplies water as a utility service or for
- 80 irrigation purposes and is also:
- 81 (i) a municipality, water conservancy district, metropolitan water district, irrigation
- 82 district, or other public agency;
- 83 (ii) a water company regulated by the Public Service Commission; or
- 84 (iii) any other owner of a community water system.
- 85 (2) (a) When an appropriator or the appropriator's successor in interest abandons or
- 86 ceases to use all or a portion of a water right for a period of seven years, the water right or the
- 87 unused portion of that water right is subject to forfeiture in accordance with Subsection (2)(c),
- 88 unless the appropriator or the appropriator's successor in interest files a nonuse application
- 89 with the state engineer.

90 (b) (i) A nonuse application may be filed on all or a portion of the water right,
91 including water rights held by a water company.

92 (ii) After giving written notice to the water company, a shareholder may file a nonuse
93 application with the state engineer on the water represented by the stock.

94 (c) (i) A water right or a portion of the water right may not be forfeited unless a judicial
95 action to declare the right forfeited is commenced within 15 years from the end of the latest
96 period of nonuse of at least seven years.

97 (ii) If forfeiture is asserted in an action for general determination of rights in
98 conformance with the provisions of Chapter 4, Determination of Water Rights, the 15-year
99 limitation period shall commence to run back in time from the date the state engineer’s
100 proposed determination of rights is served upon each claimant.

101 (iii) A decree entered in an action for general determination of rights under Chapter 4,
102 Determination of Water Rights, shall bar any claim of forfeiture for prior nonuse against any
103 right determined to be valid in the decree, but does not bar a claim for periods of nonuse that
104 occur after the entry of the decree.

105 (iv) A proposed determination by the state engineer in an action for general
106 determination of rights under Chapter 4, Determination of Water Rights, bars a claim of
107 forfeiture for prior nonuse against any right proposed to be valid, unless a timely objection has
108 been filed within the time allowed in Chapter 4, Determination of Water Rights.

109 (v) If in a judicial action a court declares a water right forfeited, on the date on which
110 the water right is forfeited:

111 (A) the right to use the water reverts to the public; and

112 (B) the water made available by the forfeiture:

113 (I) first, satisfies other water rights in the hydrologic system in order of priority date;

114 and

115 (II) second, may be appropriated as provided in this title.

116 (d) This section applies whether the unused or abandoned water or a portion of the
117 water is:

118 (i) permitted to run to waste; or

119 (ii) used by others without right with the knowledge of the water right holder.

120 (e) This section does not apply to:

121 (i) the use of water according to a lease or other agreement with the appropriator or the
122 appropriator's successor in interest;

123 (ii) a water right if its place of use is contracted under an approved state agreement or
124 federal conservation following program;

125 ~~[(iii) those periods of time when a surface water or groundwater source fails to yield
126 sufficient water to satisfy the water right;]~~

127 (iii) a water right during a period of time when a surface water source or groundwater
128 source fails to yield sufficient water to satisfy the water right;

129 (iv) a water right when water is unavailable because of the water right's priority date;

130 (v) a water right to store water in a surface reservoir or an aquifer, in accordance with
131 Title 73, Chapter 3b, Groundwater Recharge and Recovery Act, if:

132 (A) the water is stored for present or future use; or

133 (B) storage is limited by a safety, regulatory, or engineering restraint that the
134 appropriator or the appropriator's successor in interest cannot reasonably correct;

135 (vi) a water right if a water user has beneficially used substantially all of the water right
136 within a seven-year period, provided that this exemption does not apply to the adjudication of a
137 water right in a general determination of water rights under Chapter 4, Determination of Water
138 Rights;

139 (vii) except as provided by Subsection (2)(g), a water right:

140 (A) (I) owned by a public water supplier;

141 (II) represented by a public water supplier's ownership interest in a water company; or

142 (III) to which a public water supplier owns the right of use; and

143 (B) conserved or held for the reasonable future water requirement of the public, which
144 is determined according to Subsection (2)(f);

145 (viii) a supplemental water right during a period of time when another water right
146 available to the appropriator or the appropriator's successor in interest provides sufficient water
147 so as to not require use of the supplemental water right; ~~[or]~~

148 (ix) a water right subject to an approved change application where the applicant is
149 diligently pursuing certification~~[-]; or~~

150 (x) a water right during a period of time when the water right is the subject of a
151 transitional change, as defined in Section 73-3-3, made before July 1, 2013, but before the

152 municipality is required to file a change application on the transitional change under Section
153 73-3-3.

154 (f) (i) The reasonable future water requirement of the public is the amount of water
155 needed in the next 40 years by the persons within the public water supplier's projected service
156 area based on projected population growth or other water use demand.

157 (ii) For purposes of Subsection (2)(f)(i), a community water system's projected service
158 area:

159 (A) is the area served by the community water system's distribution facilities; and

160 (B) expands as the community water system expands the distribution facilities in
161 accordance with Title 19, Chapter 4, Safe Drinking Water Act.

162 (g) For a water right acquired by a public water supplier on or after May 5, 2008,
163 Subsection (2)(e)(vii) applies if:

164 (i) the public water supplier submits a change application under Section 73-3-3; and

165 (ii) the state engineer approves the change application.

166 (3) (a) The state engineer shall furnish a nonuse application form requiring the
167 following information:

168 (i) the name and address of the applicant;

169 (ii) a description of the water right or a portion of the water right, including the point of
170 diversion, place of use, and priority;

171 (iii) the quantity of water;

172 (iv) the period of use;

173 (v) the extension of time applied for;

174 (vi) a statement of the reason for the nonuse of the water; and

175 (vii) any other information that the state engineer requires.

176 (b) (i) Filing the nonuse application extends the time during which nonuse may
177 continue until the state engineer issues an order on the nonuse application.

178 (ii) Approval of a nonuse application protects a water right from forfeiture for nonuse
179 from the application's filing date until the approved application's expiration date.

180 (c) (i) Upon receipt of the application, the state engineer shall publish a notice of the
181 application once a week for two successive weeks:

182 (A) in a newspaper of general circulation in the county in which the source of the water

183 supply is located and where the water is to be used; and

184 (B) as required in Section 45-1-101.

185 (ii) The notice shall:

186 (A) state that an application has been made; and

187 (B) specify where the interested party may obtain additional information relating to the
188 application.

189 (d) Any interested person may file a written protest with the state engineer against the
190 granting of the application:

191 (i) within 20 days after the notice is published, if the adjudicative proceeding is
192 informal; and

193 (ii) within 30 days after the notice is published, if the adjudicative proceeding is
194 formal.

195 (e) In any proceedings to determine whether the nonuse application should be approved
196 or rejected, the state engineer shall follow the procedures and requirements of Title 63G,
197 Chapter 4, Administrative Procedures Act.

198 (f) After further investigation, the state engineer may approve or reject the application.

199 (4) (a) The state engineer shall grant a nonuse application on all or a portion of a water
200 right for a period of time not exceeding seven years if the applicant shows a reasonable cause
201 for nonuse.

202 (b) A reasonable cause for nonuse includes:

203 (i) a demonstrable financial hardship or economic depression;

204 (ii) the initiation of water conservation or efficiency practices, or the operation of a
205 groundwater recharge recovery program approved by the state engineer;

206 (iii) operation of legal proceedings;

207 (iv) the holding of a water right or stock in a mutual water company without use by any
208 water supply entity to meet the reasonable future requirements of the public;

209 (v) situations where, in the opinion of the state engineer, the nonuse would assist in
210 implementing an existing, approved water management plan; or

211 (vi) the loss of capacity caused by deterioration of the water supply or delivery
212 equipment if the applicant submits, with the application, a specific plan to resume full use of
213 the water right by replacing, restoring, or improving the equipment.

214 (5) (a) Sixty days before the expiration of a nonuse application, the state engineer shall
215 notify the applicant by mail or by any form of electronic communication through which receipt
216 is verifiable, of the date when the nonuse application will expire.

217 (b) An applicant may file a subsequent nonuse application in accordance with this
218 section.

219 Section 2. Section **73-2-27** is amended to read:

220 **73-2-27. Criminal penalties.**

221 (1) This section applies to offenses committed under:

222 (a) Section 73-1-14;

223 (b) Section 73-1-15;

224 (c) Section 73-2-20;

225 (d) [~~Subsection~~] Section 73-3-3[~~(9)~~];

226 (e) Section 73-3-26;

227 (f) Section 73-3-29;

228 (g) Section 73-5-9;

229 (h) Section 76-10-201;

230 (i) Section 76-10-202; and

231 (j) Section 76-10-203.

232 (2) Under circumstances not amounting to an offense with a greater penalty under
233 Subsection 76-6-106(2)(b)(ii) or Section 76-6-404, violation of a provision listed in Subsection
234 (1) is punishable:

235 (a) as a felony of the third degree if:

236 (i) the value of the water diverted or property damaged or taken is \$2,500 or greater;

237 and

238 (ii) the person violating the provision has previously been convicted of violating the
239 same provision;

240 (b) as a class A misdemeanor if:

241 (i) the value of the water diverted or property damaged or taken is \$2,500 or greater; or

242 (ii) the person violating the provision has previously been convicted of violating the
243 same provision; or

244 (c) as a class B misdemeanor if Subsection (2)(a) or (b) does not apply.

245 Section 3. Section 73-3-3 is amended to read:

246 **73-3-3. Permanent or temporary changes to the use of water.**

247 (1) For purposes of this section:

248 (a) "Change applicant" means any of the following who seek to make a permanent or
249 temporary change under Subsection (2)(a):

250 (i) the record title owner of a water right;

251 (ii) the holder of an approved but unperfected application to appropriate water;

252 (iii) a person, including a shareholder in a water company, who is the equitable owner
253 and beneficial user of a water right, even if nominal legal title is held by another person; or

254 (iv) a person who has written authorization from a person described in Subsection
255 (1)(a)(i), (ii), or (iii) to file a change application on that person's behalf.

256 [~~(a)~~] (b) "Permanent change" means a change for an indefinite period of time [with an
257 intent to relinquish the original point of diversion, place of use, or purpose of use:] to the:

258 (i) point of diversion;

259 (ii) place of use;

260 (iii) period of use;

261 (iv) nature of use for which the water is currently appropriated; or

262 (v) addition or deletion of storage as an authorized use.

263 [~~(b)~~] (c) "Temporary change" means a change for a fixed period of time, not exceeding
264 one year[-], to the:

265 [~~(2)(a) Subject to Subsection (2)(c), a person entitled to the use of water may make~~
266 permanent or temporary changes in the:]

267 [~~(i) point of diversion;]~~

268 [~~(ii) place of use; or]~~

269 [~~(iii) purpose of use for which the water was originally appropriated.]~~

270 (i) point of diversion;

271 (ii) place of use;

272 (iii) period of use;

273 (iv) nature of use for which the water is currently appropriated; or

274 (v) addition or deletion of storage as an authorized use.

275 (d) "Transitional change" means a temporary or permanent change made:

276 (i) by a municipality to a water right before the municipality files a change application;

277 (ii) in a developed area within the municipality's borders that:

278 (A) expanded into an area being served by irrigation water;

279 (B) requires domestic water service; and

280 (C) developed incrementally over an extended time period during which both domestic
281 and irrigation water were required in the area eventually encompassed by the development;

282 (iii) to a water right acquired in response to or during the transition in the developed
283 area described in Subsection (1)(d)(ii), if, during the transition:

284 (A) the municipality met the evolving demand for domestic water service by relying on
285 existing water rights and sources to serve the developed area;

286 (B) the municipality acquired water rights, including shares of stock in mutual water
287 companies, to compensate for the municipal water now being used on the developed area;

288 (C) the municipality allowed, on lands adjudicated for water use within the general
289 vicinity of the developed area, other persons, including prior owners of the acquired water
290 rights, or shareholders of a water company in which the municipality acquired shares, to
291 continue to beneficially use the water; and

292 (D) the beneficial use described in Subsection (1)(d)(iii)(C) occurred before the water
293 was commingled with other water in the main water artery that flows through the region.

294 (2) (a) A change applicant may make a permanent or temporary change to a water right
295 or an approved application to appropriate water, including a water right or approved
296 application to appropriate water involved in a general determination of water rights or other
297 suit, if the change applicant makes the change in accordance with this section.

298 (b) Except as provided by Section 73-3-30, a change may not be made if it impairs a
299 vested water right without just compensation.

300 (c) A change application on a federal reclamation project water right shall be signed
301 by:

302 (i) the local water users organization that is contractually responsible for:

303 (A) the operation and maintenance of the project; or

304 (B) the repayment of project costs; and

305 (ii) the record title owner of the water right.

306 ~~(3) A person entitled to use water shall change a point of diversion, place of use, or~~

307 ~~purpose of water use, including water involved in a general adjudication or other suit, in the~~
308 ~~manner provided in this section.]~~

309 ~~[(4) (a) A person entitled to use water may not make a change unless the state engineer~~
310 ~~approves the change application.]~~

311 (d) (i) A shareholder in a water company who seeks to make a permanent or temporary
312 change to a water right held in title by the water company shall file a change application in
313 accordance with Section 73-3-3.5.

314 (ii) An equitable owner, as defined in Section 73-3-3.6, who seeks to make a
315 permanent or temporary change to a water right held by a nominal title owner shall file a
316 change application in accordance with Section 73-3-3.6.

317 (e) (i) The record title owner of a water right who is not also the beneficial user and
318 equitable owner of the water right may not file a change application if:

319 (A) the proposed change diminishes a fundamental part of the water right of an existing
320 beneficial user and equitable owner; and

321 (B) the beneficial user and equitable owner whose right is diminished does not consent
322 to the change application in writing.

323 (ii) The provisions of Subsection (2)(e)(i) do not prevent a water company from filing a
324 change application for a proposed temporary or permanent change that diminishes the rights of
325 shareholders if the water company:

326 (A) allows shareholders to choose whether to participate in the proposed change and its
327 corresponding benefits and burdens; and

328 (B) adopts a reallocation formula that distributes the benefits proportionally among
329 participants and, for a temporary change, makes a corresponding adjustment to water delivery
330 to participants during the season, or, for a permanent change, makes a corresponding
331 adjustment among participants of ownership interests in the remaining water rights of the water
332 company.

333 (3) (a) A change applicant who files a change application with the state engineer may
334 not make the permanent or temporary change requested in the application unless, and only to
335 the extent that, the state engineer approves the change application.

336 (b) A [person entitled to use water] change applicant shall submit a change application,
337 upon forms furnished by the state engineer [and shall set forth], that includes:

- 338 (i) the change applicant's name;
- 339 (ii) the water right description, including the water right number;
- 340 (iii) the water quantity;
- 341 (iv) the stream or water source;
- 342 (v) if applicable, the point on the stream or water source where the water is diverted;
- 343 (vi) if applicable, the point to which it is proposed to change the diversion of the water;
- 344 (vii) the place, [~~purpose~~] nature, period, and extent of the [~~present~~] current use;
- 345 (viii) the place, [~~purpose~~] nature, period, and extent of the proposed use; [~~and~~]
- 346 (ix) if the change applicant is submitting a change application under Section 73-3-3.6,
- 347 the information required under Subsection 73-3-3.6(2)(e);
- 348 (x) if the change applicant is submitting a change application in accordance with
- 349 Section 73-3-3.5, the information required by Section 73-3-3.5; and
- 350 [~~(ix)~~] (xi) any other information that the state engineer requires.
- 351 [~~(5) (a) The state engineer shall follow the same procedures, and the rights and duties~~
- 352 ~~of the applicants with respect to applications for permanent changes of point of diversion, place~~
- 353 ~~of use, or purpose of use shall be the same, as provided in this title for applications to~~
- 354 ~~appropriate water.]~~
- 355 (4) (a) With respect to a change application for a permanent change:
- 356 (i) the state engineer shall follow the same procedures provided in this title for
- 357 approving an application to appropriate water; and
- 358 (ii) the rights and duties of a change applicant are the same as the rights and duties of a
- 359 person who applies to appropriate water under this title.
- 360 (b) The state engineer may waive notice for a permanent change application involving
- 361 only a change in point of diversion of 660 feet or less.
- 362 [~~(6)~~] (5) (a) The state engineer shall investigate all temporary change applications.
- 363 [~~(b) If the state engineer finds that the temporary change will not impair a vested water~~
- 364 ~~right, the state engineer shall issue an order authorizing the change.]~~
- 365 [~~(c) If the state engineer finds that the change sought might impair a vested water right,~~
- 366 ~~before authorizing the change, the state engineer shall give notice of the application to any~~
- 367 ~~person whose right may be affected by the change.]~~
- 368 [~~(d) Before making an investigation or giving notice, the state engineer may require the~~

369 applicant to deposit a sum of money sufficient to pay the expenses of the investigation and
370 publication of notice.]

371 (b) The state engineer shall issue an order authorizing a temporary change if the state
372 engineer finds that the temporary change will not impair a vested water right.

373 [~~(7)~~] (6) (a) Except as provided by Section 73-3-30, the state engineer may not reject a
374 permanent or temporary change application for the sole reason that the change would impair a
375 vested water right.

376 (b) If otherwise proper, the state engineer may approve a permanent or temporary
377 change application for part of the water involved or upon the condition that the applicant
378 acquire the conflicting water right.

379 [~~(8)~~] (a) A person holding an approved application for the appropriation of water may
380 change the point of diversion, place of use, or purpose of use.]

381 [~~(b)~~] (7) A change of an approved application to appropriate water does not:

382 [~~(i)~~] (a) affect the priority of the original application to appropriate water; or

383 [~~(ii)~~] (b) extend the time period within which the construction of work is to begin or be
384 completed.

385 [~~(9)~~] Any person who changes or who attempts to change a point of diversion, place of
386 use, or purpose of use, either permanently or temporarily, without first applying to the state
387 engineer in the manner provided in this section:]

388 (8) Except as provided in Subsection (9), a person who makes a permanent or
389 temporary change before obtaining an approved change application under this section:

390 (a) obtains no right;

391 (b) is guilty of a crime punishable under Section 73-2-27 if the change or attempted
392 change is made knowingly or intentionally; and

393 (c) is guilty of a separately punishable offense for each day of [~~the~~] a knowing or
394 intentional unlawful change that results in an immediate and direct injury to another
395 appropriator.

396 (9) A municipality that made a transitional change before July 1, 2013, without filing a
397 change application under this section is not subject to Subsection (8) for making the
398 transitional change if the municipality files a change application before July 1, 2015, that:

399 (a) reflects the transitional change made in a developed area before July 1, 2013; and

- 400 (b) for the related water rights acquired:
- 401 (i) wholly or partially maintains the existing beneficial uses; or
- 402 (ii) transfers the water rights into a source and system that can serve the developed
- 403 area.

404 (10) (a) This section does not apply to the replacement of an existing well by a new
 405 well drilled within a radius of 150 feet from the point of diversion of the existing well.

406 (b) Any replacement well must be drilled in accordance with the requirements of
 407 Section 73-3-28.

408 Section 4. Section **73-3-3.5** is amended to read:

409 **73-3-3.5. Application by a shareholder for a permanent or temporary change to**
 410 **the use of water in a water company.**

411 (1) As used in this section:

412 (a) "Shareholder" means the owner of a share of stock, or other evidence of stock
 413 ownership, that entitles the person to a proportionate share of water in a water company.

414 (b) "Water company" means any company, operating for profit or not for profit, [in
 415 which] where a shareholder has the right to receive a proportionate share, based on that
 416 shareholder's ownership interest, of water delivered by the company.

417 [~~(2) A shareholder who seeks to change the point of diversion, place of use, or purpose~~
 418 ~~of use of the shareholder's proportionate share of water in the water company shall submit a~~
 419 ~~request for the change, in writing, to the water company. This request shall include the~~
 420 ~~following information:]~~

421 [~~(a) the details of the requested change, which may include the point of diversion,~~
 422 ~~period of use, place, or nature of use;]~~

423 [~~(b) the quantity of water sought to be changed;]~~

424 (2) (a) A shareholder who files a change application under Section 73-3-3 to make a
 425 change to the shareholder's share of water in a water company shall:

426 (i) submit the proposed change application to the water company before the
 427 shareholder files the change application with the state engineer; and

428 (ii) include as part of the change application filed with the state engineer:

429 (A) the water company's response to the shareholder's proposed change application; or

430 (B) an affidavit of the shareholder documenting the water company's failure to respond

431 to the shareholder's notice of a proposed change application within the time period described in
432 Subsection (3)(a), including the extension if applicable.

433 (b) In addition to the information required under Section 73-3-3, the proposed change
434 application shall include:

435 ~~[(e)]~~ (i) the certificate number of the shareholder's stock affected by the change;

436 ~~[(d)]~~ (ii) a description of the land proposed to be retired from irrigation ~~[pursuant to]~~ in
437 accordance with Section 73-3-3, if the proposed change in place or nature of use of the water
438 involves a situation where the water was previously used for irrigation;

439 ~~[(e)]~~ (iii) an agreement by the shareholder to:

440 (A) continue to pay all applicable corporate assessments on the share affected by the
441 change; [and] or

442 (B) negotiate and prepay an amount calculated in accordance with Subsections
443 (6)(b)(ii)(A) and (B); and

444 ~~[(f) any]~~ (iv) other information that the water company may reasonably need to
445 ~~[evaluate the requested]~~ review the proposed change application.

446 ~~[(3) (a) A water company shall make a decision and provide written notice of that~~
447 ~~decision on a shareholder's request for a change application within 120 days from receipt of the~~
448 ~~request.]~~

449 ~~[(b) Based on the facts and circumstances of each proposed change, a water company~~
450 ~~may take the following action:]~~

451 ~~[(i) approve the change request;]~~

452 ~~[(ii) approve the change request with conditions; or]~~

453 ~~[(iii) deny the change request.]~~

454 ~~[(c) If the water company fails to respond to a shareholder's request for a change~~
455 ~~application, pursuant to Subsection (3)(a), the failure to respond shall be considered to be a~~
456 ~~denial of the request.]~~

457 ~~[(d) The water company may not withhold approval if any potential damage, liability,~~
458 ~~or impairment to the water company, or its shareholders, can be reasonably mitigated without~~
459 ~~cost to the water company:]~~

460 ~~[(e) A water company may consider the following factors in evaluating change~~
461 ~~applications:]~~

462 (3) (a) Except as provided in Subsection (3)(a)(i), a water company shall respond to a
463 shareholder's proposed change application within 60 days after the day on which the water
464 company receives the shareholder's proposed change application.

465 (i) If a water company requires additional time to respond to the shareholder's proposed
466 change application, the water company may, upon giving written notice to the shareholder
467 within the time period described in Subsection (3)(a), add 30 days to the time period described
468 in Subsection (3)(a).

469 (ii) A water company's failure to respond to a shareholder's proposed change
470 application within the time period described in Subsection (3)(a), including the extension if
471 applicable, constitutes consent by the water company to the proposed change.

472 (b) The water company's response to the shareholder's proposed change application
473 shall be in writing and shall:

474 (i) consent to a proposed change;

475 (ii) consent to a proposed change subject to certain conditions described by the water
476 company; or

477 (iii) oppose a proposed change, describing the reasons the water company opposes the
478 change.

479 (c) In reviewing a shareholder's proposed change application, a water company may
480 consider:

481 (i) [~~any~~] whether there is an increased cost to the water company or its shareholders;

482 (ii) [~~interference~~] whether the change will interfere with the water company's ability to
483 manage and distribute water for the benefit of all shareholders;

484 (iii) whether the proposed change represents more water than the shareholder's [~~pro~~
485 rata] proportionate share of the water company's right;

486 (iv) [~~impairment of either~~] whether the change will impair the quantity or quality of
487 water delivered to other shareholders under the existing water rights of the water company,
488 including rights to carrier water;

489 (v) whether the proposed change [~~would cause a violation of any~~] violates a statute,
490 ordinance, regulation, or order of a court or [~~governmental~~] government agency; or

491 [~~(vi) whether the shareholder has or can arrange for the beneficial use of water to be~~
492 retired from irrigation within the water company's service under the proposed change; or]

493 ~~[(vii)]~~ (vi) the cumulative effects that the approval of the change application may have
494 on other shareholders or water company operations.

495 (4) (a) The state engineer shall evaluate a shareholder's change application in the same
496 manner used to evaluate a change application submitted under Section 73-3-3, using:

497 (i) the criteria described in Section 73-3-8;

498 (ii) the considerations described in Subsection (3)(c); and

499 (iii) the water company's response to the shareholder's proposed change application,
500 including, if applicable, the result of a shareholder vote required by Section 73-3-30.

501 (b) Nothing in this section shall limit the authority of the state engineer in evaluating
502 and processing a change application.

503 (c) The state engineer may not withhold approval of a change application under this
504 section based on potential damage, liability, or impairment to the water company or its
505 shareholders if the potential damage, liability, or impairment can be reasonably mitigated
506 without cost to the water company.

507 ~~[(4)]~~ (5) The ~~[water company]~~ state engineer may require ~~[that all]~~ a shareholder to pay
508 reasonable costs associated with the shareholder's change application~~[-including costs of~~
509 ~~submitting proof, be paid by the shareholder].~~

510 ~~[(5)(a) The]~~ (6) For the shares listed in the change application, the state engineer shall
511 require that the shareholder requesting the change [must]:

512 (a) be current on all water company assessments; and [agree to]

513 (b) (i) continue to pay all applicable future assessments[-except that the shareholder
514 may choose to prepay any portion of the water company assessments attributable to an existing
515 debt of the water company.]; or

516 ~~[(b) Other than prepaid assessments, the water company may require that the~~
517 ~~shareholder continue to pay all applicable assessments.]~~

518 ~~[(6) If the water company approves the requested change, with or without conditions,~~
519 ~~the change application may be filed with the state engineer, and must:]~~

520 ~~[(a) be signed on behalf of the water company; or]~~

521 ~~[(b) be accompanied by written authorization from the water company assenting to the~~
522 ~~change.]~~

523 ~~[(7) (a) The state engineer may evaluate a change application authorized by a water~~

524 company under this section in the same manner and using the same criteria that he or she uses
525 to evaluate any other change application.]

526 ~~[(b) Nothing in this section shall limit the authority of the state engineer in evaluating
527 and processing any change application.]~~

528 ~~[(8) If an application authorized by a water company under this section is approved by
529 the state engineer, the shareholder may file requests for extensions of time to submit proof of
530 beneficial use under the change application without further permission of the water company.]~~

531 (ii) if the shareholder chooses, negotiate and prepay an amount that consists of:

532 (A) a proportionate share of all of the company's outstanding indebtedness assessable
533 to the shares subject to the shareholder's change application; and

534 (B) the present value of reasonably anticipated future assessments to the shares subject
535 to the shareholder's change application required to fund the basic operation and maintenance of
536 the company, which present value for each share is presumed to be 15 times the average
537 amount of the annual operation and maintenance assessments imposed by the company on each
538 share during the last three years.

539 (7) (a) In accordance with Section 73-3-7 and Title 63G, Chapter 4, Administrative
540 Procedures Act, a water company may file a request for agency action to protest a change
541 application filed by a shareholder only if:

542 (i) the change application filed by the shareholder is inconsistent with the consent
543 given by the water company under Subsection (3)(b)(i) or (ii); or

544 (ii) the water company opposed the change application under Subsection (3)(b)(iii).

545 (b) If a water company files a request for agency action under Subsection (7)(a), the
546 state engineer may:

547 (i) upon request of the water company or the shareholder, refer the water company and
548 shareholder to mediation;

549 (ii) require that, before the state engineer makes an order in the adjudicative
550 proceeding, the water company and shareholder mediate the dispute; or

551 (iii) if the state engineer finds that a legal issue exists in the adjudicative proceeding
552 that is appropriate for the courts to determine, require that the water company and the
553 shareholder obtain a ruling from a district court on the issue before the state engineer continues
554 with the adjudicative proceeding.

555 ~~[(9)]~~ (8) (a) Change applications approved under this section are subject to all written
556 conditions relating to the change application, including conditions:

557 (i) imposed by [the water company and] the state engineer[-]; and

558 (ii) agreed upon between the water company and the shareholder.

559 ~~[(b) If a shareholder fails to comply with all of the conditions imposed by the water~~
560 ~~company, the water company may, after written notice to the shareholder and after allowing~~
561 ~~reasonable time to remedy the failure, withdraw its approval of the application, and petition the~~
562 ~~state engineer for an order canceling the change application.]~~

563 ~~[(c) The water company may not revoke its approval of the change application or seek~~
564 ~~an order canceling the application if the conditions are substantially satisfied.]~~

565 ~~[(10) (a) The shareholder requesting the change shall have a cause of action, including~~
566 ~~an award of actual damages incurred, against the water company if the water company:]~~

567 ~~[(i) unreasonably withholds approval of a requested change;]~~

568 ~~[(ii) imposes unreasonable conditions in its approval; or]~~

569 ~~[(iii) withdraws approval of a change application in a manner other than as provided in~~
570 ~~Subsection (9).]~~

571 ~~[(b) The action referred to in Subsection (10)(a) shall be referred to mediation by the~~
572 ~~court under Title 78B, Chapter 6, Part 2, Alternative Dispute Resolution Act, unless both~~
573 ~~parties decline mediation.]~~

574 ~~[(c) If mediation is declined, the prevailing party to the action shall be entitled to costs~~
575 ~~and reasonable attorney fees.]~~

576 (b) If a shareholder fails to substantially comply with a condition described in
577 Subsection (8)(a) and neglects to remedy the failure after written notice from the water
578 company that allows the shareholder a reasonable opportunity to remedy the failure, that is not
579 fewer than 90 days after the day on which the water company gives notice, the water company
580 may:

581 (i) petition the state engineer to order a reversal of the change application approval; or

582 (ii) if the failure is nonpayment of an assessment described in Subsection (6)(b)(i) or

583 (ii), obtain a judgment against the shareholder, from a district court in the same county where
584 use of the water occurs, that consists of:

585 (A) an amount necessary to bring the shareholder current on all water company

586 assessments and fees:

587 (B) an amount calculated by the court in accordance with Subsections (6)(b)(ii)(A) and
588 (B) as if the shareholder had elected to prepay the assessments under Subsection (6)(b)(ii); and

589 (C) if the court determines it was reasonably necessary to file the action, costs and
590 reasonable attorney fees.

591 (c) A shareholder who satisfies a judgment obtained by a water company under
592 Subsection (8)(b)(ii) is no longer financially obligated to the water company for future
593 assessments.

594 (d) (i) A condition described in Subsection (8)(a) that remains unfulfilled constitutes an
595 encumbrance that attaches to the underlying water right and survives a transfer of ownership of
596 the water right.

597 (ii) A remedy described in Subsection (8)(b) is enforceable against a subsequent owner
598 of a water right that carries an encumbrance described in Subsection (8)(d)(i).

599 (9) If a shareholder's change application is denied by the state engineer and the denial
600 is upheld by a district court in a de novo action, the district court may award costs and
601 reasonable attorney fees to the water company if the district court finds that:

602 (a) the shareholder refused to accept conditions advanced by the water company for the
603 water company to consent to the proposed change; and

604 (b) the conditions advanced by the water company for accepting the shareholder's
605 change were reasonable and did not undermine the shareholder's purpose in requesting the
606 change application.

607 (10) If a shareholder's change application is approved by the state engineer and upheld
608 by a district court in a de novo action, the district court may award costs and reasonable
609 attorney fees to the shareholder if the district court finds that the water company:

610 (a) unreasonably opposed the proposed change under Subsection (3)(b)(iii); or

611 (b) imposed unreasonable conditions on the change application under Subsection
612 (3)(b)(ii).

613 (11) If a shareholder's change application is approved by the state engineer and upheld
614 by a district court in a de novo action, the district court may award actual damages beyond
615 costs and reasonable attorney fees to the shareholder if the district court finds that the water
616 company:

617 (a) unreasonably opposed the proposed changes under Subsection (3)(b)(iii) or
618 imposed unreasonable conditions on the change application under Subsection (3)(b)(ii); and
619 (b) acted in bad faith.

620 Section 5. Section **73-3-3.6** is enacted to read:

621 **73-3-3.6. Application by an equitable owner of a water right for a permanent or**
622 **temporary change to the use of water.**

623 (1) As used in this section:

624 (a) "Equitable owner" means a person, other than a shareholder in a water company,
625 who is the equitable owner and beneficial user of a water right if the water right's nominal legal
626 title is held by another person.

627 (b) "Nominal title owner" means a person, other than a water company, that holds
628 nominal legal title to a water right that is equitably owned and beneficially used by another
629 person.

630 (2) (a) An equitable owner who files a change application under Section 73-3-3 shall
631 submit the proposed change application to the nominal title owner of the water right before the
632 equitable owner files the change application with the state engineer.

633 (b) (i) Except as provided in Subsection (2)(b)(ii), a nominal title owner of a water
634 right that receives a proposed change application under Subsection (2)(a) shall respond to the
635 equitable owner's proposed change application within 60 days after the day on which the
636 nominal title owner receives the proposed change application.

637 (ii) If a nominal title owner of a water right requires additional time to respond to the
638 change application, the nominal title owner may, upon giving written notice to the equitable
639 owner within the time period described in Subsection (2)(b)(i), add 30 days to the time period
640 described in Subsection (2)(b)(i).

641 (c) A nominal title owner's response to the equitable owner's application shall be in
642 writing and shall:

643 (i) consent to the proposed change;

644 (ii) consent to the proposed change subject to certain conditions described by the
645 nominal title owner in the response; or

646 (iii) oppose the proposed change, describing the reasons why the nominal title owner
647 opposes the change.

648 (d) A nominal title owner's failure to respond to the equitable owner's proposed change
649 application within the time period described in Subsection (2)(b), including the extension if
650 applicable, constitutes consent by the nominal title owner to the proposed change.

651 (e) After the time period described in Subsection (2)(b) ends, including the extension if
652 applicable, an equitable owner may file the change application with the state engineer if the
653 equitable owner includes as part of the change application:

654 (i) the nominal title owner's response to the equitable owner's proposed change
655 application; or

656 (ii) an affidavit of the equitable owner documenting the nominal title owner's failure to
657 respond to the equitable owner's proposed change application within the time period described
658 in Subsection (2)(b), including the extension if applicable.

659 (f) The state engineer shall evaluate an equitable title owner's change application in the
660 same manner used to evaluate a change application submitted under Section 73-3-3, using:

661 (i) the criteria described in Section 73-3-8; and

662 (ii) the nominal title owner's response to the equitable title owner's change application.

663 (3) The state engineer may not withhold approval of a change application under this
664 section based on potential damage, liability, or impairment to the nominal title owner if the
665 potential damage, liability, or impairment can be reasonably mitigated without cost to the
666 nominal title owner.

667 (4) The state engineer may require an equitable owner to pay reasonable costs
668 associated with the equitable owner's change application.

669 (5) (a) In accordance with Section 73-3-7 and Title 63G, Chapter 4, Administrative
670 Procedures Act, a nominal title owner may file a request for agency action to protest a change
671 application filed by an equitable owner only if:

672 (i) the change application filed by the equitable owner is inconsistent with the consent
673 given by the nominal title owner under Subsection (2)(c)(i) or (ii); or

674 (ii) the nominal title owner opposed the change application under Subsection
675 (2)(c)(iii).

676 (b) If a nominal title owner files a request for agency action under Subsection (5)(a),
677 the state engineer may:

678 (i) upon request of the nominal title owner or the equitable owner, refer the nominal

679 title owner and equitable owner to mediation;

680 (ii) require that, before the state engineer makes an order in the adjudicative

681 proceeding, the nominal title owner and equitable owner mediate the dispute; or

682 (iii) if the state engineer finds that a legal issue exists in the adjudicative proceeding

683 that is appropriate for the courts to determine, require that the nominal title owner and the

684 equitable owner obtain a ruling from a district court on the issue before the state engineer

685 continues with the adjudicative proceeding.

686 (6) Change applications approved under this section are subject to all written

687 conditions relating to the change application, including conditions:

688 (a) imposed by the state engineer; and

689 (b) agreed upon between the nominal title owner and the equitable owner.

690 (7) If an equitable owner fails to substantially comply with a condition described in

691 Subsection (6) and neglects to remedy the failure after written notice from the nominal title

692 owner that allows the equitable owner a reasonable opportunity to remedy the failure, that is

693 not fewer than 90 days after the day on which the nominal title owner gives notice, the nominal

694 title owner may:

695 (a) petition the state engineer to order a reversal of the change application approval; or

696 (b) file an action in district court to compel compliance with the condition.

697 (8) Nothing in this section shall limit the authority of the state engineer in evaluating

698 and processing a change application.

699 Section 6. Section **73-3-30** is amended to read:

700 **73-3-30. Change application for an instream flow.**

701 (1) As used in this section:

702 (a) "Division" means the Division of Wildlife Resources, created in Section 23-14-1,

703 or the Division of Parks and Recreation, created in Section 79-4-201.

704 (b) "Fishing group" means an organization that:

705 (i) is exempt from taxation under Section 501(c)(3), Internal Revenue Code; and

706 (ii) promotes fishing opportunities in the state.

707 (c) "Fixed time change" means a change in a water right's point of diversion, place of

708 use, or purpose of use for a fixed period of time longer than one year but not longer than 10

709 years.

710 (2) (a) A division may file a permanent or temporary change application, as provided
711 by Section 73-3-3, for the purpose of providing water for an instream flow, within a specified
712 section of a natural or altered stream channel, necessary within the state for:

- 713 (i) the propagation of fish;
- 714 (ii) public recreation; or
- 715 (iii) the reasonable preservation or enhancement of the natural stream environment.

716 (b) A division may file a change application on:

- 717 (i) a perfected water right:
 - 718 (A) presently owned by the division;
 - 719 (B) purchased by the division for the purpose of providing water for an instream flow,
720 through funding provided for that purpose by legislative appropriation; or
 - 721 (C) acquired by lease, agreement, gift, exchange, or contribution; or
- 722 (ii) an appurtenant water right acquired with the acquisition of real property by the
723 division.

724 (c) A division may:

- 725 (i) purchase a water right for the purposes provided in Subsection (2)(a) only with
726 funds specifically appropriated by the Legislature for water rights purchases; or
- 727 (ii) accept a donated water right without legislative approval.

728 (d) A division may not acquire water rights by eminent domain for an instream flow or
729 for any other purpose.

730 (3) (a) A fishing group may file a fixed time change application on a perfected,
731 consumptive water right for the purpose of providing water for an instream flow, within a
732 specified section of a natural or altered stream channel, to protect or restore habitat for three
733 native trout:

- 734 (i) the Bonneville cutthroat;
- 735 (ii) the Colorado River cutthroat; or
- 736 (iii) the Yellowstone cutthroat.

737 [~~(b) Before filing an application authorized by Subsection (3)(a) to change a~~
738 ~~shareholder's proportionate share of water, the water company shall submit the decision to~~
739 ~~approve or deny the change request required by Subsection 73-3-3.5(3) to a vote of the~~
740 ~~shareholders.]~~

741 (b) If title to a water right described in Subsection (3)(a) is held by a water company, a
742 fishing group that seeks to file a change application on the water right under Subsection (3)(a)
743 shall submit the proposed change application to the water company in accordance with Section
744 73-3-3.5, and the water company shall submit the water company's response to a vote of the
745 shareholders of the company:

- 746 (i) in a manner outlined in the water company's articles of incorporation or bylaws;
747 (ii) at an annual or regular meeting described in Section 16-6a-701; or
748 (iii) at a special meeting convened under Section 16-6a-702.

749 (c) The specified section of the natural or altered stream channel for the instream flow
750 may not be further upstream than the water right's original point of diversion nor extend further
751 downstream than the next physical point of diversion made by another person.

752 (d) (i) The fishing group shall receive the Division of Wildlife Resources' director's
753 approval of the proposed change before filing the fixed time change application with the state
754 engineer.

755 (ii) The director may approve the proposed change if:

756 (A) the specified section of the stream channel is historic or current habitat for a specie
757 listed in Subsections (3)(a)(i) through (iii);

758 (B) the proposed purpose of use is consistent with an existing state management or
759 recovery plan for that specie; and

760 (C) the water right owner has received a certificate of inclusion from a person who has:

761 (I) entered into a programmatic Candidate Conservation Agreement with Assurances
762 with the United States Fish and Wildlife Service, as authorized by 16 U.S.C. Sec. 1531(a)(5)
763 and 1536(a)(1); and

764 (II) obtained an enhancement of survival permit, as authorized by 16 U.S.C. Sec.
765 1539(a)(1)(A).

766 (iii) The director may disapprove the proposed change if the proposed change would
767 not be in the public's interest.

768 (e) (i) In considering a fixed time change application, the state engineer shall follow the
769 same procedures as provided in this title for an application to appropriate water.

770 (ii) The rights and the duties of a fixed time change applicant are the same as provided
771 in this title for an applicant to appropriate water.

772 (f) A fishing group may refile a fixed time change application by filing a written
773 request with the state engineer no later than 60 days before the application expires.

774 (g) (i) The water right for which the state engineer has approved a fixed time change
775 application will automatically revert to the point of diversion and place and purpose of use that
776 existed before the approved fixed time change application when the fixed time change
777 application expires or is terminated.

778 (ii) The applicant shall give written notice to the state engineer and the lessor, if
779 applicable, if the applicant wishes to terminate a fixed time change application before the fixed
780 time change application expires.

781 (4) In addition to the requirements of Subsection 73-3-3~~(4)~~(3)(b), an application
782 authorized by this section shall:

783 (a) set forth the legal description of the points on the stream channel between which the
784 instream flow will be provided by the change application; and

785 (b) include appropriate studies, reports, or other information required by the state
786 engineer demonstrating the necessity for the instream flow in the specified section of the
787 stream and the projected benefits to the public resulting from the change.

788 (5) (a) For a permanent change application or a fixed time change application filed
789 according to this section, 60 days before the date on which proof of change for an instream
790 flow is due, the state engineer shall notify the applicant by mail or by any form of
791 communication through which receipt is verifiable of the date when proof of change is due.

792 (b) Before the date when proof of change is due, the applicant must either:

793 (i) file a verified statement with the state engineer that the instream flow uses have
794 been perfected, setting forth:

795 (A) the legal description of the points on the stream channel between which the
796 instream flow is provided;

797 (B) detailed measurements of the flow of water in second-feet changed;

798 (C) the period of use; and

799 (D) any additional information required by the state engineer; or

800 (ii) apply for a further extension of time as provided for in Section 73-3-12.

801 (c) (i) Upon acceptance of the verified statement required under Subsection (5)(b)(i),
802 the state engineer shall issue a certificate of change for instream flow use in accordance with

803 Section 73-3-17.

804 (ii) The certificate expires at the same time the fixed time change application expires.

805 (6) No person may appropriate unappropriated water under Section 73-3-2 for the
806 purpose of providing an instream flow.

807 (7) Water used in accordance with this section is considered to be beneficially used, as
808 required by Section 73-3-1.

809 (8) A physical structure or physical diversion from the stream is not required to
810 implement a change for instream flow use.

811 (9) This section does not allow enlargement of the water right that the applicant seeks
812 to change.

813 (10) A change application authorized by this section may not impair a vested water
814 right, including a water right used to generate hydroelectric power.

815 (11) The state engineer or the water commissioner shall distribute water under an
816 approved or a certificated instream flow change application according to the change
817 application's priority date relative to the other water rights located within the stream section
818 specified in the change application for instream flow.

819 (12) An approved fixed time change application does not create a right of access across
820 private property or allow any infringement of a private property right.

Legislative Review Note
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